84-687

NO. _____

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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

SYBIL BROWN, ANNE CALDWELL AND
SALLY MCRAE
Petitioners,

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST; LOCAL 46,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS; AND PUGET SOUND
CHAPTER NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Abraham A. Arditi
Northwest Labor and Employment Law Office
900 Hoge Building
Seattle, Washington 98104
1-206-623-1590
Attorney for Petitioners

QUESTIONS PRESENTED

1. Does a policy of granting veterans a special age credit to "equalize" for time served in the military have a disparate impact on women under Title VII?

2. Should the Court resolve the conflict among the circuits as to whether the "clearly erroneous" standard applies to review of a finding of disparate impact under Title VII?

3. Must a Title VII plaintiff's EEOC charge specify whether a claim is based on a disparate impact or a disparate treatment theory?

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OPINIONS BELOW

The opinion of the court of appeals is reported at 732 F.2d 726. The findings and conclusions of the district court are not reported. The opinion, findings and conclusions appear in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1984. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on July 25, 1984. The court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

The case involves 42 U.S.C. § 2000e-2, 5(b) and 11, and 29 CFR § 1601.12(a)(13), all of which are set out in the Appendix.

STATEMENT OF THE CASE

Until April 20, 1978, respondent Puget Sound Electrical Apprenticeship and Training Trust ("JATC") imposed an age ceiling of 26 on applicants to its electricians apprenticeship program but allowed veterans up to age 29 to apply. JATC policy permitted veterans to deduct one year from their age for each year of military service (to a maximum of four) in determining eligibility for the apprenticeship program.

Since about 98% of veterans in the State of Washington are men, about 98% of individuals eligible for the veteran's age credit are men. Not surprisingly, all of the twenty-two apprentices who were admitted to the JATC's apprenticeship program under this exemption are men. There is no indication that the veterans age credit is justified by business necessity.

Petitioners Sybil Brown, Anne Caldwell and Sally McRae were each denied admission to the apprenticeship program in 1977 because they were over age, but would have satisfied the age requirement if they had been veterans. They sued in district court, alleging that the veterans age credit discriminated against women in violation of Title VII. The district court's jurisdiction was based on 42 U.S.C. § 2000e-5(f)(3). After petitioners filed a motion for preliminary injunction, the JATC eliminated the age credit, raising the age ceiling to 29 for all applicants, veterans and non-veterans alike. Sybil Brown and Anne Caldwell were admitted to the apprenticeship program through the normal selection process shortly thereafter. Sally McRae was denied admission, although a man who scored lower in the selection process was admitted.

The case was tried to a magistrate sitting as special master. On his recommendation, the district court held that the veterans age credit violated Title VII. The district court found that 8% of men but only 0.2% of women in the JATC's labor market area were Viet Nam or post-Viet Nam era veterans, that the veterans age credit had a disparate impact on women, that the veterans age credit served no business purpose and that petitioners were excluded from the apprenticeship program in 1977 because of their ineligibility for the veterans age credit. The district court expressly found that the veterans age credit had "a clear cut disparate impact on women." (Appendix, p. A-53.) The district court held that the veterans age credit was not protected by Title VII's exemption for certain veterans preferences, since it did not originate in a "Federal, State, territorial, or local law creating special rights or preferences for veterans." 42 U.S.C. § 2000e-11. Finally, the district court found that the JATC intentionally discriminated against Sally McRae in 1978 by admitting ahead of her a male applicant who scored lower than she did in the selection process and was ranked beneath her on the waiting list. The district court awarded back pay, front pay, injunctive relief and attorneys fees. Finding that the JATC acted as the agent of respondents Local 46, International Brotherhood of Electrical Workers and Puget Sound

Electrical Contractors Association, the district court held all three liable for the relief.

The court of appeals reversed by a divided panel. It agreed that Title VII's exemption for statutory veterans preferences did not apply, but held that the existence of disparate impact was a question of law, that the veterans age credit had no disparate impact on women and that Sally McRae's 1978 disparate treatment claim was barred because her EEOC charge was phrased in disparate impact terms. A strong dissent favored affirming because the veterans age credit had a prohibited disparate impact on women.

REASONS FOR GRANTING THE WRIT

1. This Case Involves An Important Issue of Federal Law Involving the Relationship Between Title VII and Veterans Preferences

This Court clarified in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), the circumstances under which use of a veterans preference was intentional discrimination against women in violation of the Fourteenth Amendment. However, *Feeney* involved a veterans preference created by state statute, so Title VII's disparate impact approach was inapplicable. 42 U.S.C. § 2000e-11. Still to be addressed are the circumstances under which use of a veterans preference is non-intentional discrimination under Title VII's disparate impact analysis. This is an important issue of federal law which should be clarified by this Court.

The viability of privately conceived veterans preferences in employment is an issue of national importance. There are almost 22 million veterans in the civilian labor force, according to the 1980 Census. *1980 Census of Population, Vol. 1, Chapter C, Part 1 General Social and Economic Characteristics* (1983). The Court has observed that restrictions on the number of women who can enlist in the armed forces and the exclusion of women from the

draft have made veterans "an overwhelmingly male class." *Feeney v. Personnel Administrator, supra* at 269. This fact makes it likely that any preference for veterans will clash with Title VII's aim of ensuring equality for women in the workplace. Congress attempted to reconcile the tension by exempting from Title VII's prohibition any veterans preference based on "Federal, State, territorial, or local law." 42 U.S.C. § 2000e-11. The court of appeals agreed with the district court that the exemption did not apply here. Nevertheless, it circumvented the disparate impact test by labeling the veterans age credit an "equalizer."

The difficulty with this is that even absolute, lifetime veterans preferences have been characterized as "measure[s] designed to reward veterans for the sacrifice of military life." *Personnel Administrator v. Feeney, supra* at 265. Calling a veterans preference an "equalizer" does not lessen the adverse consequences for women, but it could ultimately insulate almost any veterans preference from a Title VII disparate impact challenge despite the contrary intent of Congress.

The veterans age credit is not truly an "equalizer," since it singles out for special recognition only one of many reasons a person might fail to apply for apprenticeship before age 26. The logic which permits a veterans age credit here would also endorse a pregnancy age credit, which "equalized" for time women were out of the labor market because of child bearing. Ultimately, almost any imaginable age credit can be characterized as an "equalizer," whether it adjusts for time spent in universities, hospitals, different locales or civilian employment with the government. However, this only suggests that none of them really is, since a mechanism which "equalizes" for only one of many such factors is really a preference. The following examples illustrate the effect of the veterans age credit.

One: A 22 year old man with four years of active military service would have a total of up to *eight* years to apply.

A 22 year old woman who has no military service but gave birth to several children would have a total of perhaps *seven* years to apply.

Two: A 22 year old man who decided to enlist for four years of active military service instead of going to college has no more than *eight* years to apply.

A 22 year old woman who decided to go to college for four years instead of enlisting in the military has no more than *four* years to apply.

Three: A 26 year old man with four years of active military service who has just moved to the JATC's area has *four* years to apply.

A 26 year old woman with no military service who has just moved to the JATC's area has *no* opportunity to apply.

Four: A 26 year old man with four years of active military service who has just decided for the first time that he wants to or can be an apprentice electrician has *four* years to apply.

A 26 year old woman who has no military service but has just decided for the first time that she wants to or can be an apprentice electrician has *no* opportunity to apply.

Five: A 26 year old man with four years of active military service who decided the year before to become an apprentice electrician but failed to complete his application has *four* more years to apply.

A 26 year old woman with no military service who decided the year before to become an apprentice electrician but failed to complete her application has *no* more opportunity to apply.

Yet other examples come easily to mind, but the last four are the most pertinent because they describe the circumstances of petitioners.

The characterization of the veterans age credit as an 'equalizer" is unfortunate indeed, for when it enacted Title VII,

> Congress . . . provided that tests or *criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox* . . . The Act proscribes not only overt discrimination but practices that are fair in form but discriminatory in operation.

Griggs v. Duke Power Co. , 401 U.S. 424, 431 (1971). (Emphasis

added.) The Court has noted that veterans preferences "represent an awkward — and, many argue, unfair — exception to the widely shared view that merit and merit alone should prevail" in employment decisions. *Personnel Administrator v. Feeney, supra* at 280. This Court should grant certiorari to clarify the circumstances under which a privately conceived veterans preference is prohibited under Title VII's disparate impact approach.

2. The Court Should Resolve the Conflict Among the Circuits as to Whether a Finding of Disparate Impact in a Title VII Case is Subject to the "Clearly Erroneous" Rule

The Court should resolve the conflict among the circuits as to whether a finding of disparate impact is subject to the "clearly erroneous" standard of review set by Rule 52(a), Fed. R. Civ. P.

The court of appeals here overturned the district court's finding of disparate impact without giving it the deference required by the "clearly erroneous" rule.

> Appellants contend that the veterans' age credit did not have a disparate impact on women. This issue presents a question of law which we must review de novo.

(Appendix, p. A-14.) *Brown v. Puget Sound Electrical Apprenticeship and Training Trust*, 732 F.2d 723, 730 (9th Cir. 1984). This ruling is at odds with the decisions of courts of appeal in other circuits, which recognize that the existence of disparate impact is a factual question, review of which is circumscribed by the "clearly erroneous" standard.

> [O]n appellate review the standard we apply is whether the district court *clearly erred* in finding whether the plaintiff class established a prima facie factual case of adverse impact of the educational requirement . . .

Wall v. Mississippi Department of Public Welfare, 730 F.2d 306,

315 (5th Cir. 1984)(emphasis added); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1259 (6th Cir. 1981) ("It was for the district court in the first instance to determine whether these statistics permitted an inference as to whether the experience requirement had a disparate impact . . . [W]e are unable to conclude that its finding in this respect was clearly erroneous."); *Hameed v. International Association of Ironworkers*, 637 F.2d 506, 511 (8th Cir. 1980) ("[F]inding that the high school diploma requirement had a disproportionate impact . . . is not clearly erroneous."); *Guardians Ass'n of New York City v. Civil Service Commission*, 633 F.2d 232, 240 (2nd Cir. 1980), aff'd, __ U.S. __, 103 S.Ct. 3221 (1984) ("[W]e cannot conclude that [the] finding of disproportionate impact was clearly erroneous."); *see also Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 691 (8th Cir. 1983) ("[T]he District Court's finding that the defendants' selection plan had a disparate impact on employees protected by the ADEA was not clearly erroneous and it is affirmed. *See* Fed. R. Civ. P. 52(a).")

The district court expressly found that the veterans age credit had a "clear cut disparate impact on women," that it had "an adverse impact on women" and "[t]he disparity in effect of the age credit on men and women is statistically significant." (Appendix, p. A-53-54.) The court of appeals did not cite any specific legal error which might have induced these findings, so relaxation of the "clearly erroneous" standard was inappropriate. *See Pullman Standard v. Swint*, 456 U.S. 273, 287 (1982). Nor would labeling the existence of disparate impact as an "ultimate" rather than a "subsidiary" fact alter the standard of review. *Id.* Had the finding of disparate impact been made by a district court within the Second, Fifth, Sixth or Eighth Circuits, it would have been affirmed.

This case merits review by the Court, because it involves an important question about the appropriate standard for appellate review in Title VII cases. The Court has held that a finding of discriminatory intent in a Title VII case is protected by the "clearly

erroneous" rule (*Pullman Standard v. Swint, supra*), but has not had occasion to decide whether a finding of disparate impact is entitled to the same protection. The Court has twice held in disparate treatment cases that appeals courts must apply the same standards of review in Title VII as other actions. *U.S. Postal Service v. Aikens*, __ U.S. __, 103 S.Ct. 1478 (1983); *Pullman-Standard v. Swint, supra*. Despite the clarity of these pronouncements, the circuits have split on whether a finding of disparate impact is entitled to the same deference as other findings.

3. The Ruling Below on the Sufficiency of McRae's EEOC Charges Conflict With Applicable Decisions of this Court.

The Court of Appeals held that McRae's EEOC charges could support jurisdiction only over disparate impact rather than disparate treatment claims. This ruling conflicts with applicable decisions of this Court on the sufficiency of EEOC charges.

McRae's charges read,

> *The respondent discriminates against women* in the administration of, and *in admission to, the apprenticeship program*. I am a woman. On August 16, 1977, I tried to apply for the commercial electrical apprenticeship program. My application was rejected because I was over 25 years old and had no military service. I believe this age requirement is discriminatory.

(Appendix, p. A-12-13.) The charges also state that the discrimination is "continuing." (Appendix, p. A-47.) The court of appeals held that the charges were insufficient to confer jurisdiction over McRae's 1978 disparate treatment claim because they allege only disparate impact claims. In so doing, it became the first court of appeals to require a Title VII plaintiff to elect at the charge filing stage the legal theory on which he or she would later proceed in court.

What is or should be key in an EEOC charge is the factual statement. This Court has observed, "Either [a disparate impact or

a disparate treatment] theory may, of course, be applied to a particular set of facts." *Teamsters v. United States*, 431 U.S. 324, 336 n. 15 (1977). In fact, the terms "disparate impact" and "disparate treatment" did not become current until *Teamsters*, which was decided about the same time McRae filed her charges. (*See* Appendix, p. A-45.) McRae's charges specify neither disparate impact nor disparate treatment. McRae alleged in her charges the facts on which her claim was based — namely, continuing discrimination in admission to apprenticeship. The "disparate impact" characterization is simply a gloss which the court of appeals placed on the charges. This Court recently held that an EEOC Commissioner's charge need only allege facts.

> The statute itself prescribes only minimal requirements pertaining to the form and content of charges of discrimination. Section 706(b) provides merely that [c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. 42 U.S.C. § 2000e-5(b). However, in accordance with the last mentioned clause, the EEOC has promulgated a regulation that provides, in pertinent part, that [e]ach charge should contain . . . [a] *clear and concise statement of the facts*, including the pertinent dates, constituting the alleged unlawful employment practices. 29 CFR § 1601.12(a)(3) (1983). Until rescinded, this *rule is binding on the Commission as well as complainants*.

EEOC v. Shell Oil Co., __ U.S. __, 104 S.Ct. 1621, 1630 (1984). (Emphasis added.) The statute and regulation the Court cited apply equally to private plaintiffs and the EEOC. 42 U.S.C. § 2000e-5(b); 29 CFR § 1601.12(a)(3). McCrae's factual allegation of continuing discrimination in admission to apprenticeship met their requirements, whether she would later characterize it as disparate impact or disparate treatment.

The district court found that McRae had been the victim of intentional discrimination in 1978, a finding which was never challenged on appeal. The district court also believed that McRae's 1978 claim was "reasonably related" to the 1977 claim which she described in her EEOC charges.

Even after discrimination had been found, the court of appeals reversed for failure to specify in her EEOC charges the precise legal theory on which McRae would later sue. This ruling is at odds with the Court's consistently held view that meritorious Title VII claims ought not be defeated by procedural niceties. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982); *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972).

CONCLUSION

The Court should grant certiorari to review the decision of the court of appeals.

Respectfully submitted,
Abraham A. Arditi
Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 83-3865

D.C. NOS. C-77-817C and C-79131C

O P I N I O N

SYBIL BROWN, ANNE CALDWELL AND
SALLY MCRAE

Plaintiffs-Appellees,

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendants-Appellants.

SYBIL BROWN, ANNE CALDWELL AND
SALLY MCRAE

Plaintiffs-Appellees,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
a corporation; and, LOCAL 46,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS.

Defendants-Appellants.

FILED May 3, 1984

Appeal from the United States
District Court for the
Western District of Washington
John C. Coughenour,
District Judge, Presiding
Argued and submitted
January 3, 1984

Before: WRIGHT, TANG, and ALARCON, Circuit Judges

ALARCON, Circuit Judge:

The International Brotherhood of Electrical Workers Local No. 46 [Local] and the Puget Sound Chapter of the National Electrical Contractors Association [NECA] appeal from the judgment awarding back pay, costs, and attorney's fees to Sybil Brown, Anne Caldwell, and Sally McRae [Appellees] in a Title VII action. We are asked to decide whether the district court was correct in adopting the special master's conclusion that "the veterans age credit here violated Title VII . . . ." and was the cause of Appellees' injuries.

PERTINENT FACTS

In 1969, Local and NECA formed the Puget Sound Electrical Joint Apprenticeship

and Training Trust [JATC] for the purpose of supporting programs to train electrical apprentices and journeymen. Applicants to the JATC's construction electricians apprenticeship program were considered eligible on the basis of age between their 18th birthday and their 26th birthday.

In compliance with standards first suggested by the federal government in 1945, the JATC adopted an age credit exception for veterans. In 1966 and 1971, after Title VII was enacted, the Department of Labor's Bureau of Apprenticeship Training notified JATCs around the country that standards for admission to their apprenticeship programs could contain a veterans' age credit. In 1971, the Bureau of Apprenticeship Training approved National Apprenticeship and Training Standards which included an age credit for veterans. In this respect, the Special Master found that "[i]n establishing and

maintaining its veterans age credit policy, the JAC relied in good faith on policies endorsed by the federal government."

The JATC adopted the age credit because it agreed with the federal government's position that persons who served their country might be foreclosed from apprenticeship training because of their age. Young men and women who joined the armed forces would be unable to apply to the JATC program during their military term. Therefore, they would have fewer years to apply to the program than men and women who remained in the civilian labor force until they were 26 years of age. The JATC attempted to give veterans an equal opportunity to apply for apprenticeship training by allowing them to deduct one year from their age for each year spent in military service. This age credit, however, was limited to a maximum of four years. A veteran with more than four years

of service thus would still have fewer years to apply for an apprenticeship than would non-veterans.

The following examples illustrate the impact of the veterans' credit on applicants to the program.

One. A 22-year old veteran with four years of service would have no more than eight years to apply.

A 22-year old non-veteran would have a total of eight years to apply.

Two. A 25-year old veteran with eight years of service would have a total of four years to apply.

A 25-year old non-veteran would have a total of eight years to apply.

Three. A 29-year old veteran who entered the armed services at age 25 and served four years would have no more than a total of eight years to apply.

Sybil Brown and Sally McRae did not apply for admission to the construction

electricians apprenticeship program until they were over 25 years of age. Anne Caldwell applied when she was 25, but failed to complete the application before her 26th birthday. Appellees had not served in the armed forces prior to filing their application. Thus, they did not qualify for an age credit. Their applications were denied.

In 1977, Appellees filed charges with the Equal Employment Opportunity Commission [EEOC] against Local, NECA and the JATC [Appellants] claiming the age credit afforded to veterans had a disparate impact on women.

In 1978, the JATC abolished its veterans' age credit and raised the maximum age for all applicants to 29. Brown and Caldwell then reapplied to the construction program and were accepted. McRae reapplied to the construction program and was placed at number 34 on the waiting list. In 1978,

a male who was number 108 on the list was offered admission to the apprenticeship program before McRae. She filed no charge with the EEOC over the incident.

After receiving right to sue notices from the EEOC regarding their disparate impact claim, Appellees brought a consolidated action in federal court. McRae additionally raised a discriminatory treatment claim based on the waiting list bypass. The evidence in this case was presented to a magistrate sitting as a special master. Appellants raised jurisdictional objections to the lower court's entertaining either Appellees' disparate impact claim or McRae's discriminatory treatment charge. The special master rejected the jurisdictional objections, and recommended that the district court find for Appellees on both the disparate impact and discriminatory treatment allegations. He also recommended

finding the JATC the agent of Local and NECA, and assessing attorney's fees and back pay against Appellants. The district court adopted the special master's recommendations. Because we conclude that the lower court lacked jurisdiction over McRae's discriminatory treatment claim, and that the veterans' age credit was not the cause of Appellees' alleged injuries, we reverse.

DISCUSSION

A. Jurisdiction of the District Court

We first address Appellants' attack on the jurisdiction of the district court to enter judgment in this matter. Appellants present two arguments in support of their request that we dismiss the Appellees' claims.

First. Appellees filed their claims in the district court prematurely in violation of the 180-day waiting period prescribed by statute.

Second. McRae's claim of discriminatory treatment in 1978 was not reasonably related to her 1977 EEOC charges of disparate impact.

1. Validity of the Right to Sue Notice

Title VII places primary responsibility for disposing of employment discrimination complaints with the EEOC in order to encourage informal conciliation of employment discrimination claims and foster voluntary compliance with Title VII. Ong v. Cleland, 642 F.2d 316, 319 (9th Cir. 1981). Title VII plaintiffs must therefore exhaust their administrative remedies before seeking judicial relief from discriminatory action. Id. at 320. Congress enacted 42 U.S.C. § 2000e-5(f)(1) to protect aggrieved individuals from undue delay. This statute provides that if the EEOC has neither filed a Title VII action nor entered into a conciliation agreement to which the complainant is a party within

180 days from the date the charge is filed, the complainant must be notified that he or she may now bring a civil action. If specified EEOC officials determine it is improbable that the EEOC will take such final action within 180 days, 29 C.F.R. § 1601.28(a)(2) authorizes the EEOC to issue a right to sue notice before 180 days elapse.

The EEOC issued Appellees a right to sue notice prior to the expiration of 180 days, pursuant to section 1601.28(a)(2), based on their disparate impact charge against the JATC. Appellants argue that the Regulation authorizing early right to sue notices is invalid. They maintain that the 180-day period provided for in 42 U.S.C. § 2000e-5(f)(1) is a mandatory requirement designed to assure the EEOC's primary role in handling employment discrimination claims. This court upheld the validity of right to sue notices issued

prior to the expiration of 180 days in Bryant v. California Brewers Ass'n., 585 F.2d 421 (9th Cir. 1978), vacated and remanded on other grounds, 444 U.S. 598 (1980). See also Saulsbury v. Wismer & Becker, Inc., 664 F.2d 1251, 1257 (9th Cir. 1980) (right to sue notice issued before 180 days elapsed was valid). Therefore, under the law of this circuit, the district court did not err in assuming jurisdiction over Appellees' disparate impact claim.

2. Reasonable Relation of the Discriminatory Treatment Claim

When an employee seeks judicial relief for incidents not listed in his original EEOC charge, a federal court may assume jurisdiction over the new claims if they are "like or reasonably related to the allegations of the EEOC charge." Oubichon v. Northern American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973). If closely related incidents occur after a charge has

been filed, additional investigative and concilative efforts would be redundant. "'To requre a second 'filing' by the aggrieved party . . . would serve no purpose other than the creation of an additional procedural technicality.'" Ramirez v. National Distillers & Chemical Corp., 586 F.2d 1315, 1320 (9th Cir. 1978) citing Love v. Pullman Co., 404 U.S. 522, 526 (1972).

Where claims are not so closely related that agency action would be redundant, the EEOC must be afforded an opportunity to consider disputes before federal suits are initiated. Bypassing the administrative process under such circumstances frustrates the policy of encouraging informal conciliation and fostering voluntary compliance with Title VII. McRae filed the following charge with EEOC:

> The respondent discriminates against women in the

> administration of, and in admission to, the apprenticeship program. I am a woman. On August 16, 1977, I tried to apply for the commercial electrical apprenticeship program. My application was rejected because I was over 25 years old and had no military service. I believe this age requirment is discriminatory.

Any investigation of whether McRae's application was rejected as the result of disparate impact would not have emcompassed her subsequent claim that when she reapplied to the program she was subjected to intentional sex discrimination. "'It is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'" Serpe v. Four-Phase Systems, Inc., 718 F.2d 935, 937 (9th Cir. 1983), citing Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970). McRae's failure to exhaust her administrative remedies before the EEOC precluded the presentation of her

discriminatory treatment claim in federal court.

B. Necessity of Proof of Discriminatory Impact

The special master conclude that "the veterans age credit here violated Title VII . . . because the veterans age credit prevented [Appellees'] admission to the construction program in 1977." This conclusion was adopted by the district court.

Appellants contend that the veterans' age credit did not have a disparate impact on women. This issue presents a question of law which we must review de novo. See Vesey v. United States, 626 F.2d 627, 629 (9th Cir. 1980) (review of damage judgment under Federal Tort Claims Act).

Title VII makes it "an unlawful employment practice for any . . . joint labor-management committee controlling apprenticeship or other training . . . to

discriminate against any individual because of his . . . sex . . . in admision to, or employment in, any program established to provide apprenticeship or other training." 42 U.S.C. § 2000e-2(d).

Title VII does not prohibit laws that expressly discriminate against non-veterans. In 42 U.S.C. § 2000e-11, Congress provided as follows: "Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, Territorial, or local law creating special rights or preferences for veterans." Appellants argue that "[a]gainst the back drop of pro-veteran legislation and explicit protection of such policies in Title VII, it beggars belief that Congress intended to prohibit private voluntary efforts to equalize employment opportunity for veterans as constituting illegal sex discrimination."

Appellants' reliance on section

2000e-11 is misplaced. As pointed out by Appellees, "no law creates the JAC's veterans age credit." The exception to Title VII contained in section 2000e-11 is expressly limited to any "Federal, State, Territorial, or local law" which may have a discriminatory effect on non-veterans. The JATC's age credit was adopted by a non-governmental private organization. The fact that it was encouraged to do so by an agency that is part of the executive branch of the federal government cannot convert the veterans' age credit into an act of Congress. Furthermore, as we shall discuss below, the veterans's age credit does not have a discriminatory impact on non-veterans. Thus, section 2000e-11 would be inapplicable even if Congress had required veterans' age credits in apprenticeships, because no preference is afforded.

The district court concluded that the JATC veterans' age credit "had a clear-cut

disparate impact on women." In reaching this conclusion the court found that 21.5 percent of all males and only 0.4 percent of all females in the area covered by the apprenticeship program are veterans, and 8.0 percent of all males and 0.2 percent of all females are Viet Nam or post-Viet Nam era veterans. Since veterans could apply to the program until a later age than non-veterans, the court determined that men were give preferential treatment in applying for apprenticeship training. This analysis ignores the fact that veterans could not receive apprenticeship training during the years they served in the military, whereas non-veterans could apply for training between their 18th and 26th birthdays.

Contrary to the district court's conclusion, the veterans' age credit did not prevent the admission of women to the apprenticeship program. Under the

challenged program women had a maximum of eight years to apply for apprenticeship training. The existence of the age credit did not give veterans more than eight years to apply for the apprenticeship program. Thus, the existence of the age credit had no adverse effect whatsoever on women. Had the age credit not been created, however, veterans would have had less time to apply for apprenticeship training than non-veterans of the same age. The program did not give a less-qualified veteran preference over a better qualified non-veteran. The sole effect of the age credit was to give some veterans the same amount of time to apply for apprenticeship training as was available to non-veterans. As can be seen from the examples set forth above, the age credit program failed to give the veteran with more than four years service in the armed forces the same opportunity available to the non-veteran.

Contrary to Appellees' contention, the disparate impact analysis developed in Griggs v. Duke Power Co., 401 U.S. 424 (1971), is inapplicable here. In Griggs, an employer required a high school education or a passing score on a standardized intelligence test as a condition of employment or transfer at its plant in Draper, North Carolina. Both requirements operated to disqualify Blacks at a higher rate than Whites. The court noted that "[b]asic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools." Id. at 430. The education and testing requirements thereby "operate[d] as a 'built-in headwind'" to employment opportunity for Blacks. Id. at 432. The requirements had not been shown to predict successful performance of the

jobs for which they were required. Because Title VII requires the removal of "unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification," Id. at 431, the education and testing score requirements were found to violate Title VII in Griggs.

The JATC's veterans' age credit, by contrast, cannot be characterized as a headwind or barrier to employment opportunity since it had no effect on the number of years that non-veterans could apply for apprenticeship training.

Appellees correctly observe that three federal trial courts "have applied a disparate impact analysis to veterans preference claims" (emphasis added). These cases do not support the judgment of the district court. Rather, they involve attempts to prefer veterans over equally

qualified non-veterans.

In Bailey v. Southeastern Area Joint Apprenticeship Committee, 561 F. Supp. 895, 912 (N.D.W.Va. 1983), the court found that the practice of giving veterans extra points on their interview scores had a disparate impact on women. In Krenzer v. Ford, 429 F. Supp. 499, 502 (D.D.C. 1977), the facts showed that the Administrator of the Veterans Administration would submit only veterans' names for appointment to the Board of Veterans Appeals. The court held "that the 'veterans only' requirement . . . ha[d] a disproportionate impact upon the class of women [female attorneys] before the court." In Woody v. City of West Miami, 477 F. Supp. 1073, 1078 (S.D. Fla. 1979), the court was called upon to decide whether a city's policy of giving preference to veterans who had served in the armed forces for 20 years in the hiring of police

officers had a disparate impact on women. In each of these cases veterans were given a preference not granted equally qualified women who were non-veterans.

In the instant case, at the time Appellees applied, they were no longer qualified for the training program because they exceeded the age limit. The extension of that limit for veterans, who were unable to apply while in military service, had no effect on these Appellees. Appellees had the opportunity to apply for apprenticeship training for eight years. The age credit gave veterans no more than eight years to apply. The age credit's sole effect was to afford veterans the same opportunity to apply for the apprenticeship training available to non-veterans.1/ We therefore hold that the district court erroneously applied a disparate impact analysis to these facts. Judgment for the appellees is reversed. They suffered no disadvantage.

Because we conclude the veterans' age credit did not affect Appellees' opportunity to be hired, we need not decide whether the JATC operated as Local's and NECA's agent. The judgment for Appellees, including back pay, costs, and attorney's fees, is REVERSED.

FOOTNOTE

1/ The dissent notes that the JATC afforded no similar waiver for other disabilities, "[f]or example, a temporary physical disability or a tour with the Peace Corps or VISTA . . . ." No evidence was presented that these Appellees were members of any such group. No evidence was presented that more men than women belong to such groups. We therefore cannot reach the interesting legal question that might be presented by such a case, and confine ourselves to addressing the issue at hand: that is, did the age credit have a discriminatory impact on these Appellees because they were non-veterans?

Brown, et al. v. Puget Sound Electrical Apprenticeship and Training Trust - No. 83-3865

WRIGHT, Circuit Judge, dissenting:

I dissent from that portion of the majority opinion holding that the veterans age credit has no prohibited disparate impact on women. I would affirm the district court's conclusion on this issue.

Title VII prohibits facially neutral employment practices that have a discriminatory impact on a protected class of employees and are not justified by business necessity. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 (1977). Women are a protected class of workers.

The majority concludes that appellants' program had no discriminatory impact on nonveterans. It says that the age credit did not prevent acceptance of women for the apprenticeship program, but gave veterans the same eight years in which

to apply that all nonveterans enjoyed. It concludes that the disparate impact analysis of Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971), is inapplicable here because the age credit did not erect a barrier to an apprenticeship.

The effect of the veterans age credit was that, of all 26 through 29-year-old applicants, only those who were veterans could be eligible for apprenticeship. In the area covered by the program, 8% of males and 0.2% of females are Viet Nam or post-Viet Nam era veterans. The age credit had a disparate impact on women.

The majority says that the district court ignored the fact that veterans could not apply for the program while they were were in the military, while nonveterans could apply. Veterans did not enjoy a preference, the majority asserts, they just were not penalized for serving their country.

Nonveterans also may have suffered disabilities preventing them from applying for an apprenticeship between the ages of 18 and 25. For example, a temporary physical disability or a tour with the Peace Corps or VISTA could prevent application.

Veterans were given special treatment through the age credit. Because that treatment had a disparate effect on women, it was in violation of Title VII.

I would affirm.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMENDED JUDGMENT

NOS. C77-817C and C79-131C

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

ENTERED May 18, 1983

THIS MATTER having come before the Court and the issues having been duly considered and a decision having been duly rendered, it is hereby ORDERED, ADJUDGED AND DECREED that Judgment be entered:

(1) In favor of plaintiffs Sybil Brown, Anne Caldwell, and Sally McRae and against defendants Puget Sound Electrical Apprenticeship and Training Trust, Puget Sound Chapter National Electrical Contractors Association, and Local 46, International Brotherhood of Electrical Workers, in the following sums, plus interest at the rate of twelve percent per annum from March 31, 1983: (a) $22,465.94 for Sybil Brown; (b) $47,276.19 for Ann Caldwell; (c) $49,496.95 for Sally McRae; and (d) $26,111.25 in attorneys' fees;

(2) Enjoining defendants from refusing to pay plaintiffs Brown, Caldwell and McRae the difference between journey-level wages and what they are and were

making from September 1, 1981 until the time they graduate from the apprenticeship program;

(3) Enjoining defendants from refusing to make contributions sufficient to ensure that plaintiffs Brown, Caldwell and McRae each have the same fringe benefit coverage they would have had if they had been admitted to the program in 1977; and

(4) Dismissing the claims of plaintiff Sharon Prater against defendants.

The Clerk of this Court is instructed to send uncertified copies of this Judgment to all counsel of record.

DATED this 18th day of May, 1983

/s John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ORDER ON PLAINTIFFS' MOTIONS TO ALTER OR AMEND JUDGMENT AND FOR ADDITIONAL ATTORNEYS' FEES

NOS. C77-817C and C79-131C

SYBIL BROWN, et al.,
Plaintiffs

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, et al.,
Defendants.

ENTERED May 18, 1983

THESE MATTERS come on for consideration on the motions of the plaintiffs for additional attorneys' fees and to alter or amend the Judgment. The Court finds and rules as follows:

1. The motion for additional attorneys' fees is GRANTED. Under Title VII, an attorney may be compensated for all time reasonably spent on a matter. See Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240 (9th Cir. 1982). The time spent by counsel since November 2, 1982 was time reasonably spent and the hourly rate is reasonable. The Court hereby awards additional attorneys' fees of $3,165 (42.2 hours at $75 per hour).

2. Plaintiff's motion to amend the Judgment is GRANTED. The Judgment shall reflect damages in the following sums: (a) $22,465.94 for Sybil Brown; (b) $47,276.19 for Anne Caldwell; and (c) $49,496.95 for Sally McRae. Attorneys' fees shall be in

the sum of $26,111.25, which includes the award for additional fees. Interest shall be provided at the rate of 12 per cent per annum from March 31, 1983.

3. Pursuant to Fed. R. Civ. P. 65(d) and the Court's prior Order, defendants are hereby enjoined from refusing to pay plaintiffs Brown, Caldwell and McRae the difference between journey-level wages and what they are and were making from September 1, 1981 until the time they graduate from the apprenticeship program. Defendants are further enjoined from refusing to make contributions sufficient to ensure that plaintiffs Brown, Caldwell and McRae each have the same fringe benefit coverage they would have had if they had been admitted to the construction program in 1977.

All other terms of the Court's Order of March 15, 1983 remain in full force and effect.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 18th day of May, 1983.

/s/ John C. Coughenour
John C. Coughenor
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JUDGEMENT ON DECISION
BY THE COURT

NOS. C77-817C and C79-131C

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

ENTERED March 15, 1983

This action came on for consideration before the court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment is hereby entered:

(1) In favor of plaintiffs Sybil Brown, Anne Caldwell, and Sally McRae and against defendants Puget Sound Electrical Apprenticeship and Training Trust, Puget Sound Chapter National Electrical Contractors Association, and Local 46, International Brotherhood of Electrical Workers, together with attorneys' fees and costs to be taxed; and

(2) Dismissing the claims of plaintiff Sharon Prater against defendants Puget Sound Electrical Apprenticeship and Training Trust, Puget Sound Chapter National Electrical Contractors Association, and Local 46, International

Brotherhood of Electrical Workers.

DATED this 15th day of March, 1983.

/s/ Charles R. Buchanan
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ORDER ADOPTING REPORT,
FINDINGS AND CONCLUSIONS
OF SPECIAL MASTER

NOS. C77-817C and C79-131C

SYBIL BROWN, et al.,
Plaintiffs

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

ENTERED March 15, 1983

The Court has reviewed the record in the above consolidated cause de novo, together with the Report of United States Magistrate Philip K. Sweigert before whom as Special Master the action was tried. The Court has also reviewed the objections of the parties to the Magistrate's Recommended Findings of Fact and Conclusions of Law and memoranda in support, and those portions of the transcript designated by the parties as necessary to de novo review.

It is therfore ORDERED that the Report, Recommendation, Findings and Conclusions of the Special Master in the above consolidated cause be, and the same are, hereby ADOPTED and AFFIRMED in all respects; and

It is FURTHER ORDERED that judgment be entered in the cause:

(1) In favor of plaintiffs Sybil Brown, Anne Caldwell, and Sally McRae and

against defendants Puget Sound Electrical Apprenticeship and Training Trust, Puget Sound Chapter National Electrical Contractors Association, and Local 46, International Brotherhood of Electrical Workers, together with attorneys' fees and costs to be taxed; and

(2) Dismissing the claims of plaintiff Sharon Prater against defendants Puget Sound Electrical Apprenticeship and Training Trust, Puget Sound Chapter National Electrical Contractors Association, and Local 46, International Brotherhood of Electrical Workers.

The Clerk of this Court is directed to send copies of this Order to all counsel of record and to Magistrate Sweigert.

DATED this 14th day of March, 1983.

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

NOS. C77-817C and C79-131C

SYBIL BROWN, et al.,
Plaintiffs

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

FILED August 30, 1982

The above-entitled cause came on regularly for trial before the undersigned sitting as Special Master. Northwest Labor and Employment Office and Abraham Arditi appeared as counsel for plaintiffs and the firm of Hafer, Cassidy, and Price appeared for defendants. Trial took place on August 17, 18, 20, 21, and 28, 1981, and plaintiffs' Motion for Attorneys' Fees was submitted on December 18, 1981. I have considered all the evidence presented and the arguments of counsel, and being fully advised, make the following recommended findings of fact and conclusions of law:

I

FINDINGS OF FACT

(A) Parties.

(1) Plaintiffs Sybil Brown, Anne Caldwell, Sharon Prater, and Sally McRae are women born on the following dates:

(a) Sybil Brown - November 2, 1948;

(b) Anne Caldwell - March 16, 1950;

(c) Sharon Prater - November 23, 1941;

(d) Sally McRae - June 7, 1949.

(2) Defendant Puget Sound Electrical Apprenticeship and Training Trust ("JAC") has existed as a trust since 1969 and has functioned as a joint labor-management committee controlling apprenticeship or other training or retraining at least since 1975.

(3) Defendant Puget Sound Chapter National Electrical Contractors Association ("NECA") is a Washington corporation incorporated in 1949 which has been an association of electrical contractors since its inception.

(4) At least since 1974 NECA has been the agent of one or more employers who:

(a) Were engaged in an industry affecting commerce; and,

(b) Had fifteen or more employees for each working day of at least twenty weeks in the then current or preceding calendar year.

(5) Since at least 1975 defendant Local 46, International Brotherhood of Electrical Workers ("Local 46") has been a labor organization with fifteen or more members.

(6) At least since 1975 Local 46 has acted as the representative of one or more employers who:

(a) Were engaged in an industry affecting commerce; and,

(b) Had fifteen or more employees for each working day of at least twenty weeks in the then current or preceding calendar year.

(7) At least since 1975 Local 46 has maintained a hiring hall which procures employees for employers or procures work opportunities for employees.

(B) Administrative Proceedings.

(8) Charges were filed with the Equal Employment Opportunity Commission ("EEOC") by:

(a) Sybil Brown against:

(i) The JAC, NECA, and Local 46 on May 31, 1977; and

(ii) The JAC on August 11, 1977.

(b) Anne Caldwell against:

(i) The JAC on June 8, 1977; and,

(ii) NECA and Local 46 on August 31, 1977.

c) Sharon Prater against:

(i) The JAC and Local 46 on December 27, 1977; and,

(ii) The JAC, NECA, and Local 46 on November 24, 1978.

(d) Sally McRae against the JAC, NECA, and Local 46 on August 29, 1977.

(9) Complaints were filed with the

Washington State Human Rights Commission ("WSHRC") by:

(a) Sybil Brown against:

(i) The JAC, NECA, AND Local 46 on May 31, 1977; and,

(ii) The JAC on August 11, 1977.

(b) Anne Caldwell against:

(i) The JAC and Local 46 on June 13, 1977; and,

(ii) NECA and Local 46 on August 31, 1977.

(c) Sharon Prater against the JAC, NECA, and Local 146 on November 24, 1978.

(d) Sally McRae against the JAC, NECA, and Local 46 on August 29, 1977.

(10) The EEOC deferred the following charges to the WSHRC:

(a) Anne Caldwell's charge against the JAC.

(b) Sharon Prater's initial charges

against the JAC and Local 46.

(11) Plaintiffs received right-to-sue letters based on each of the above EEOC charges.

(12) Within ninety days of receiving each of those right-to-sue letters plaintiffs either filed one of these consolidated actions or amended the Complaint to allege receipt of the right-to-sue letter.

(13) Each of Sally McRae's EEOC charges states in part:

> "The respondent discriminates against women in the administration of, and in admission to, the apprenticeship program."

Each also expressly alleges discrimination which is "continuing."

(14) Right-to-sue letters issued to plaintiffs based on their charges against the JAC were issued before the end of a one hundred and eighty day period following filing of the related charges. However,

Prater's later right-to-sue letter against the JAC was issued more than one hundred and eighty days after her second charge against the JAC was filed.

(C) Operation of the JAC.

(15) Since its inception the JAC has administered the construction electricians apprenticeship program in Local 46's territorial jurisdiction. During 1941-69 a predecessor of the JAC administered the construction electrians apprenticeship program in Local 46's territorial jurisdiction.

(16) The JAC has administered the residential wireman trainee program since 1977.

(17) Since its inception the JAC has operated under standards which have been amended from time to time.

(18) Until 1978 when the age ceiling was raised the qualifications for admission to the construction program were that the

applicant had to:

(a) Be between the ages of eighteen and twenty-five;

(b) Be a high school graduate or have a G.E.D.;

(c) Have at least one year each of algebra and geometry; and,

(d) Score at least "medium" on the aptitude test administered by the Washington State Employment Security Department Apprenticeship Information Center.

(19) Until 1978 applicants for admission to the construction program were considered eligible on the basis of age between their eighteenth birthday and their twenty-sixth birthday.

(20) The application process for the construction electricians apprenticeship program is generally as follows: Each person who files a written application signs the Record of Apprenticeship

Applicants, and receives and completes the Application for Apprenticeship Form.

(21) Upon returning the completed application form the applicant is instructed to take an aptitude test conducted by the Washington State Employment Security Department Apprenticeship Information Center, and to obtain and submit to the JAC a transcript of high school records and grades. Each applicant is also instructed to have a physical examination and to forward the results to the JAC.

(22) When the completed application form, the results of the aptitude test, the transcript of high school records and grades and the results of the general physical examination are in the possession of the JAC, the application process and application are deemed complete.

(23) Each year a cut-off date for completed applications is set. The JAC

notifies those applicants who have completed their applications to appear for an interview. Typically, eight persons perform applicant interviews for the JAC, although only two interview any one applicant. Interviewed applicants are ranked, then either admitted or put on a waiting list.

(24) At the interviews applicants are evaluated largely on the basis of subjective criteria such as "stamina," "family health," "desire to be an electrician," "reasons for choosing this trade," "hobbies," "interest in mechanical and electrical hobbies," "attitude toward hard work," "attitude toward school work," "attitude toward authority," "attitude toward responsibility," "personal traits," "appearance," "aggressiveness," "sincerity," "dependability," "character," and "habits." Each interviewer gives the applicant a numerical score after the

interview.

(25) The criteria on which applicants are judged at their interviews cannot be precisely quantified.

(26) No interviewees are expressly rejected. But if they are not selected in the year they apply they must reapply if they wish to be considered the following year.

(27) Until 1980 the only objective qualifications for admission to the residential program were that the applicant must:

(a) Be at least eighteen years of age, and,

(b) Take a color vision exam.

D. The Veterans Age Credit for the Construction Program.

(28) Until April 20, 1978, the JAC permitted applicants of either sex to deduct one year from their age for each year of military service (to a maximum of

four years) in computing their age. On April 20, 1978, the JAC raised the maximum age for its construction program to twenty-nine. No age credit was given in 1978 or later for military service. In establishing and maintaining its veterans age credit policy, the JAC relied in good faith on policies endorsed by the federal government.

(29) The county, state, and national statistics presented by Dr. Helen Remich all show that the veterans age credit had a clear-cut disparate impact on women.

(30) In the four-county area covered by the apprenticeship program 8 percent of males and .2 percent of females are Viet Nam or post-Viet Nam era veterans. Figures on Viet Nam and post-Viet Nam era veterans are the most likely available statistics to show the effect of the age credit on people between the ages of eighteen and twenty-nine during the years in question.

(31) The disparity in the effect of the age credit on men and women is statistically significant. Its magnitude is 94.5 standard deviations. A magnitude of at least two standard deviations is normally considered statistically significant.

(32) These figures also show adverse impact under the Four Fifths Rule. The ratio of the proportion of women who can benefit from the age credit to the proportion of men who can benefit from it is 3 percent. When the ratio of the proportion of two groups who benefit from a practice is 80 percent or less there is adverse impact under the Four Fifths Rule.

(33) Other statistics also show that the veterans age credit had an adverse impact on women. In the four-county area covered by the apprenticeship program 21.5 percent of all males and .4 percent of all females are veterans.

(34) In the State of Washington 2 percent of all veterans and 2 percent of all Viet Nam era veterans are women. Nationwide 2.1 percent of all veterans are women.

(35) There is no reason to believe that applicant flow statistics would show any different rates of impact than area statistics.

(36) Applicant flow statistics would likely distort the effect of the age credit since some women were deterred from applying by the fact that they did not qualify for the age credit.

(37) During 1970-77 the JAC admitted twenty-two apprentices to the program who were over twenty-five when they applied but who were permitted to deduct time in active military service from their age. All were male. This number was 6.0 percent of the total admitted to the program in those years.

(38) Neither Sybil Brown, Anne Caldwell, nor Sally McRae has been in the military service.

(39) The policy of giving applicants age credit for active military service has not been necessary to job safety or efficiency nor did it serve any purpose related to job safety or efficiency.

(E) The Claim of Sybil Brown.

(40) Sybil Brown arrived in Seattle in October, 1976, and on January 10, 1977, she applied to the JAC for admission to the construction electricians apprenticeship program. At that time, she was twenty-eight years old.

(41) The JAC secretary and coordinator both told her that she was too old to apply. Nevertheless, she filled out an application.

(42) She completed her application on February 14, 1977.

(43) Except for her age Sybil Brown

met the minimum qualifications necessary to be eligible for an interview. There were openings in the program at that time.

(44) The JAC scheduled an interview for Sybil Brown for the construction program. The day of the interview its secretary told her not to come because she was too old.

(45) Even if the interview had been held it would have made no difference. The testimony of Frank Oleson makes it clear that Sybil Brown would not have been admitted because she was too old.

(46) Had Sybil Brown been a veteran she would have met the age requirement in 1977.

(47) She reapplied for the construction electricians apprenticeship program. She was accepted (after the age ceiling was raised to twenty-nine) and began work on May 30, 1978.

(F) <u>The Claim of Anne Caldwell</u>.

(48) Anne Caldwell first became interested in an electrician career in 1975. She submitted an application for admission to the construction electricians apprenticeship program on February 2, 1976. However, she did not complete her applicaton (sic) before the cut-off established by the JAC and was not considered that year.

(49) Anne Caldwell later called the JAC to reapply for the construction electricians apprenticeship program. A JAC representative told her she was too old to apply. Nevertheless, she persisted and reapplied on March 17, 1977. Except for her age, she met the minimum qualifications necessary to be eligible for an interview. There were openings in the program at the time.

(50) Caldwell was interviewed in 1977 and placed on the waiting list at position 109. Despite the interview, the

JAC disqualified her because she was over the age of twenty-five.

(51) Had Anne Caldwell been a veteran she would have met the age requirement in 1977.

(52) On March 17, 1978, she reapplied for the construction program. She was accepted into the program as a first-year apprentice (after the age ceiling was raised) and began work as such on August 7, 1978.

(G) The Claim of Sally McRae.

(53) Sally McRae tried to apply for the construction electricians apprenticeship program in 1977 when was (sic) twenty-seven years old. She was told she was too old to apply and so did not apply for that reason.

(54) Had she been a veteran she would have met the age requirement in 1977. She was admitted to the residential program in October, 1977, after her employer signed

a collective bargaining agreement with Local 46 adopting the Local 46 residential wireman contract.

(55) When she heard the age ceiling was being raised Sally McRae applied for the program on March 14, 1978. The JAC considered her application complete as of March 24, 1978. On April 29, 1978 (after the age ceiling was raised), she was interviewed for the construction electricians apprenticeship program.

(56) By letter dated May 23, 1978, the JAC advised her that she was thirty-four on the waiting list. Sally McRae was not accepted into the program.

(57) By letter dated May 23, 1978, the JAC advised a male named William Halfill that he was 108 on the waiting list. The JAC offered him a place in the program by letter dated September 26, 1978. That he turned it down is immaterial.

(58) Defendants articulated no

reason why a male who was lower on the waiting list than Sally McRae should be admitted while she was not.

(H) The Claim of Sharon Prater.

(59) Sharon Prater first became interested in work in the electricians trade while she was in her teens. Both of her grandfathers were contractors and she helped one of them do both construction and remodelling electricians work. By the time she was nineteen, she had accumulated approximately two full years of this work.

(60) While she was in her teens Sharon Prater began asking contractors at job sites for work as an electrician. These requests persisted almost through to the present. She was unable to find work this way for a number of years.

(61) Because of her inability to obtain work as an electrician she went into the most closely related field, namely, electronics. During 1959-70 she worked for

United Control Corporation, Telemetrics, Inc., Electro Development Corporation, and Tally Corporation. She worked her way up from basic soldering to building prototypes, doing quality control work, training other employees, and working as a foreman.

(62) During this period she also worked on a contract basis after hours for other companies. One of them was Quinton Instruments Company for whom she built prototype heart rate machines. Another was S. F. Burns Company for whom she manufactured junction boxes, repaired speakers, manufactured speakers, wired a drive-in theater, and served as night foreman.

(63) She also received training in electronics through United Control Corporation and Electro Development Corporation.

(64) This work and training in

electronics is helpful to work as an electrician.

(65) From about 1960 to the present Sharon Prater also did the electrical work on her house and houses of friends who were remodeling. She has done the electrical work on about fifteen such houses.

(66) Plaintiff Sharon Prater testified that before November, 1971, when she reached her thirtieth birthday, she made some attempts to be hired by some employers in the electrical industry. She also testified that an unnamed person connected with Local 46 told her in 1964 in an unrelated context that the union had no work for women. There was no proof that any of the three defendants deterred Prater from applying to the apprenticeship program during the relevant period. Because of the vague and isolated character of her testimony, the Court cannot find that Prater was deterred from applying to the

apprenticeship program before her thirtieth birthday.

(67) In 1975 when she was thirty-four, at the urging of a friend, she called Local 46 to ask if they had training programs for women and was advised she was too old and they had no training programs for women.

(68) On November 21, 1977, Sharon Prater tried to apply for the construction electricians apprenticeship program at the JAC office. She gave the JAC a copy of her resume which describes her work in electronics through 1970. The JAC coordinator told her she was too old to apply. She was thirty-five years old at the time. Except for her age Sharon Prater met the minimum qualifications necessary to be eligible for an interview. There were openings in the program at the time.

(69) On the same day, November 21, 1978, she applied for the residential

wireman trainee program. She met the minimum qualifications necessary to be interviewed for the program and on May 16, 1978, she was interviewed. During the interview she was asked whether she was involved in this lawsuit. However, the evidence also establishes that the other three plaintiffs were accepted by the JAC following commencement of this suit.

(70) She was placed on the waiting list but was advised on June 4, 1978, that she had not been accepted. Many males were also placed on the waiting list and not accepted. Plaintiff Prater produced no evidence of the number of applicants that year to the residential program. The only facts in the record pertinent to the impact of the selection process for the residential program are the number of males and females admitted. There are no applicant flow figures or other statistics to support a finding that the interview

process for the residential program was discriminatory in 1978. Nor is there any evidence that her non-selection in 1978 was pretextual.

(I) Agency.

(71) Since 1969 the JAC has been comprised of an equal number of representatives of Local 46 and NECA. Four representative (sic) each of Local 46 and NECA sit on the JAC's Board of Trustees. The Board of Trustees administers the JAC, setting the qualifications and procedures for the admission of applicants to the two apprenticeship programs run by it. The Board, or its delegates, conduct applicant interviews.

(72) The JAC's trust agreement does not name a beneficiary other than NECA and Local 46 and the standards under which the JAC operates provide that amendments are ". . . subject to approval . . ." by NECA and Local 46.

(73) Under the trust agreement ties on the JAC are to be resolved like other labor-management disputes, namely, through grievance procedures in the Local 46 - NECA collective bargaining agreement.

(74) The JAC's trust agreement does not specify the grounds or procedure for removing trustees. The Local 46 - NECA collective bargaining agreement permits Local 46 and NECA to each remove its own representatives for cause.

(75) NECA and Local 46 each retain the power to control their own representatives to the JAC although neither has called for the resignation of any representative because of the stand he took on the JAC. There is no evidence of any interference by Local No. 46 or NECA in the operation of the JAC or the decisions of its trustees.

(76) The JAC is subject ot (sic) the joint control of NECA and Local 46.

(J) Other Findings.

(77) The first woman was admitted to the JAC construction electricians program in 1974, however, plaintiffs introduced no applicant flow statistics or other evidence that women had applied and were excluded before 1974. Plaintiffs offered no proof of the existence of an available pool of women interested in construction electricians work during the period in question.

(78) The table below shows for 1974-78 the number of applicants by sex to the construction electricians apprenticeship program, the number by sex of those applicants who were interviewed for the program and the number by sex of those applicants who were admitted to the program.

		Applicants		Interviewed		Admitted	
		M	F	M	F	M	F
(a)	1974	306	9	Not Avail.		112	1
(b)	1975	495	36	131	6	43	3
(c)	1976	470	33	163	5	43	1
(d)	1977	573	38	212	20	55	3
(e)	1978	506	70	215	19	64	5

(79) The applicant figures in Finding (78) were derived from the Record of Apprenticeship Applicants. The JAC made an effort to note who the women applicants were at the time they applied. However, they did not always note who the women applicants were. The JAC made no effort to note who the men applicants were at the time they applied. The figures given above for men applicants were computed by deducting the number of known women applicants from the number of total applicants.

(80) Plaintiffs produced general labor statistics in support of their claim that the JAC interviewing procedures for

the construction program discriminated against women. But applicant flow statistics as set forth in Finding (78) show that in 1975, 50 percent of the women and 33 percent of the men interviewed were admitted. The respective figures for 1976 are 20 percent of the women and 26 percent of the men; for 1977, 15 percent of the women and 26 percent of the men; and, for 1978, 26 percent of the women interviewed were admitted as opposed to 28.5 percent of the males interviewed.

(81) From 1971 until March, 1974, the JAC delegated authority for admissions to the construction program to a subcommittee pursuant to a court order in United States v. Ironworkers, Local 86, et al., W.D. Wash. Cause No. 8618, a race discrimination case. Also pursuant to such order the age ceiling was raised to forty-five for blacks. The higher age ceiling ended in 1974. Fifty-one blacks, over the

age of twenty-five when they applied were admitted to the program to implement the order in that case.

(82) The JAC has approved apprenticeship applications upon request of employers who for the first time entered into a collective bargaining agreement with Local 46 or agreed to participate in the apprenticeship program and whose employees were over the age limit. When this has occurred such applications were separately considered. There is no evidence, however, that the age ceiling for the construction program was waived for men but not for women.

(83) There was testimony of isolated sexist comments by agents of defendants. None of the persons accused of making such statements was directly involved in the applicant selection process. The testimony is disputed but the Court need not resolve the dispute because none of the comments

establish directly or by inference that the defendants intentionally discriminated against any plaintiff because of their sex.

(K) Damages.

(84) But for the veterans age credit Sybil Brown, Anne Caldwell, and Sally McRae would each have been admitted to the construction electricians apprenticeship program in 1977.

(85) Of the males indentured into the 1978 construction electricians apprenticeship class five started work on June 1, 1977. Six others started work by June 7, 1977. Only two started work prior to June 1, 1977.

(86) It is likely that had they been admitted in 1977, Sybil Brown, Anne Caldwell, and Sally McRae would each have started work as apprentices on about June 1, 1977. It is unlikely that they would have started work before June 1, 1977.

(87) Each year since 1975 construction electrician apprentices have worked on average 1,750 hours per year.

(88) Each year since 1979 journeyman construction electricians have worked on average 1,740 hours per year.

(89) Because they were denied admission to the construction program in 1977 Sybil Brown, Anne Caldwell, and Sally McRae lost wages. Their net loss through August, 1981, plus 7 percent per annum simple interest is:

(a) Sybil Brown - $13,114.89;

(b) Ann Caldwell - $37,088.83; and,

(c) Sally McRae - $24,808.32.

(90) These figures assume that Sybil Brown, Anne Caldwell, and Sally McRae had advanced normally through the program, worked the average number of apprentice hours during their apprenticeship and worked the average number of journeyman hours once they turned out.

(91) Vacation pay is not paid in addition to the basic wage rates specified in the collective bargaining agreements but deducted from it to be deposited in an account for later withdrawl (sic).

(92) In addition to lost wages Sybil Brown, Anne Caldwell, and Sally McRae each also lost fringe benefits contributions.

(93) Prior to her admission to the construction program in 1978 Anne Caldwell was unemployed. During her unemployment she made reasonable efforts to find work by going to the Shipscalers Union hiring hall every week and telephoning to find out what the work situation was.

(L) Attorneys' Fees.

(94) Plaintiffs' counsel spent a total of 414.6 hours working on this case as follows:

(a) Mr. Arditi - 394.6 hours; and,

(b) Mr. Goldberg - 20 hours.

(95) The records do not indicate

precisely how many of those hours are attributable to the claims of Sharon Prater who did not prevail but it is reasonable to apportion three quarters of the time spent, or 310.95 hours to the three prevailing plaintiffs. Most of the time was that of a single attorney and there was therefore little duplication of effort.

(96) Hourly rates of $75.00 for Mr. Arditi and of $50.00 for Mr. Goldberg are reasonable hourly rates when considered in light of rates customarily charged for similar legal services in the Seattle legal community and the amount requested is in line with awards in similar cases.

(97) While the case was not complex the veterans preference issue was a novel one especially in light of the Supreme Court decision in Personnel Administrator v. Feeney, 442 U.S. 256 (1979), and the case was vigorously defended at both the pretrial and trial stage.

(98) The case was handled on a contingent fee basis.

(99) The amount involved and results obtained are substantial. The three prevailing plaintiffs are entitled to approximately $75,000.00 in back pay and the elimination of the veterans credit prior to an earlier hearing on a request for preliminary injunction was of benefit to many women besides the prevailing plaintiffs and was probably the result of plaintiffs' pursuit of this case.

(100) Mr. Arditi is an experienced and able attorney in the field of employment discrimination law and has a high reputation for thoroughness and preparation for trial.

(101) The skill required to perform the legal services required in this case was substantial in light of the vigorous defense by highly skilled opposing counsel.

(102) Application of a multiplier to

base attorneys' fees computed is not appropriate in this case.

(103) There is an insufficient showing that acceptance and handling of this case precluded other employment by plaintiffs' counsel.

(104) There were no time limitations imposed by the client or the circumstances.

(105) The case was no more "undesirable" than other Title VII cases.

(106) Counsel represented the plaintiffs only with respect to this case.

II

CONCLUSIONS OF LAW

(A) Jurisdiction

(1) The Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §1343(a) and 42 U.S.C. §2000e, et seq. Local 46 is a labor organization and NECA an employer under Title VII. Because it is an agent of local 7 (sic) and NECA the JAC is both a labor

organization and an employer under Title VII. 42 U.S.C. §2000e-2(d).

(2) Plaintiffs have met all the requisite conditions to bringing suit under Title VIII. See 42 U.S.C. §2000e-5(b) -(c) and (e) - (f). The Court is not deprived of jurisdiction because the EEOC issued some of the right-to-sue letters less than one hundred and eighty days after the corresponding charges were filed.

(3) The Court has jurisdiction over Sally McRae's claim of discrimination in 1978 since it is reasonably related to the claims raised in her 1977 EEOC charges.

(B) The Veterans Age Credit for the Construction Program.

(4) Under Title VII a facially neutral practice which has a disparate impact on women is illegal unless it is justified by business necessity.

(5) Plaintiffs made a prima facie showing that the veterans age credit was

discriminatory by showing that it had a clear-cut disparate impact on women. That the veterans age credit also disqualifies non-veteran males is irrelevant. The proper comparison is between its effect on men and its effect on women rather than between its effect on veterans and its effect on non-veterans.

(6) By stipulating that the veterans age credit was not necessary to job safety and efficiency defendants acknowledged that it is not justified by business necessity.

(7) While Title VII contains an exemption for veterans preference it is expressly limited to those created by ". . . Federal, State, territorial, or local law . . ." 42 U.S.C. §2000e-11. Because the veterans age credit here was not created by law this exemption does not apply.

(8) The veterans age credit is not protected by Personnel Administrator v.

Feeney, supra. The Court there required a showing that a veterans preference was adopted with intent to discriminate. However, Feeney was decided under the Fourteenth Amendment while this case is brought under Title VII. Intent need not be proved in Title VII disparate impact cases.

(9) The Court concludes that the veterans age credit here violated Title VII. Sybil Brown, Anne Caldwell, and Sally McRae are entitled to relief under Title VII because the veterans age credit prevented their admission to the construction program in 1977. The absence of intent to discriminate does not affect their right to full relief.

(3) Sally McRae's 1978 Claim.

(10) Title VII prohibits treating women differently from men because of their gender. Sally McRae applied, met the minimum qualifications, was interviewed,

and placed number 34 on the waiting list This alone does not establish a prima facie case of disparate treatment under McDonnell Douglass (sic), but the fact that she was then passed over in favor of a male lower on the list satisfied the third and fourth criteria of McDonnell Douglass (sic) and establishes a prima facie case.

(11) Because defendants failed to articulate a nondiscriminatory explanation for these facts the Court concludes that the denial to Sally McRae of admission in 1978 was discriminatory.

(12) Sally McRae is thus entitled to relief under Title VII for discrimination in 1978 independent of her veterans age credit claim.

(3) Sharon Prater's Claim.

(13) Sharon Prater has failed to establish by a preponderance of the evidence that she was discriminated against with respect to any claims advanced by her.

(14) She claims first that she was deterred from applying to the construction program when she was within the age limit because of defendants' past discrimination in the electrical trade. She argues that the age ceiling perpetuates past discrimination by excluding her from applying once the discrimination has ceased. She proved neither contention. She did not establish a prima facie case of past discrimination. The general population statistics offered by Prater do not permit the Court to infer that defendants excluded women before 1974. There was no evidence that any women applied before 1974 and were excluded. Nor did she show the existence of an available pool of women interested in the construction electrician trade in the years in question.

(15) Further, she did not establish that she was a victim of past

discrimination even assuming that it existed. Prior to the date on which she reached age 30, in November of 1971, the only evidence of deterrence were vague references to attempts to be hired by some employers and an isolated comment made by someone connected with Local 46 in 1974, under circumstances wholly unrelated to entry into the electrical trade. The Court is unable to find that any of these defendants actually deterred her from seeking entry into that program on that evidence. She first contacted Local 46 in 1975, several years after the time she purportedly was discouraged from applying for admission.

(16) Neither has Sharon Prater established a prima facie case in relation to her disparate treatment claim concerning her 1978 application to the residential program in 1978. She did not show that the JAC continued to seek others of equal

qualification following her placement on the waiting list. Nor did she show that she was rejected. Rather, she was placed on a waiting list along with many males because there were many more applicants than available spots in the residential program. Both elements are required to establish a prima facie case under McDonnell Douglas.

(17) Even if plaintiff Prater had established a prima facie case, defendants have articulated a legitimate nondiscriminatory reason for Prater's placement on the waiting list. After an interview, she was not deemed as well qualified as those admitted. Although based substantially on so-called subjective criteria, there is no evidence that the interview process was discriminatory. Prater produced no evidence of the number of applicants to the residential program. The only extant statistics for the

residential program are the number of males and females admitted. There is no statistical base on which to ground a finding that the interview rating process was discriminatory, since applicant figures are needed to measure the rate at which males and females pass through the interview. Nor did plaintiff Prater prove by nonstatistical evidence that the interview process was discriminatory.

(18) Plaintiff Prater did not show that the selection procedure by which she was rated less qualified than others was pretextual. Her claim fails for the above reasons.

(19) Finally, Sharon Prater did not establish that defendants retaliated against her for filing an EEOC charge or her lawsuit. The fact that she was asked during her interview whether she was a principal in the lawsuit does not by itself establish retaliation. It is unlikely that

defendants retaliated against Prater, as the other three plaintiffs were admitted into their programs after plaintiffs filed suit.

(20) Plaintiffs alleged as an alternative claim that the selection process for the construction program in itself is discriminatory and responsible for their 1977 or 1978 rejections. Plaintiffs have not established that claim by a preponderance of the evidence. The interview statistics for years 1975 through 1978 have been summarized in the findings of fact. The percentage difference in selection rates between males and females is too narrow, and the comparative rates through the years too inconsistent, to permit this Court to find discrimination in the interview process. No other evidence exists that shows that the interview process discriminated against women or against plaintiffs.

(21) Plaintiffs attacked the interview process on the alternative ground that the JAC uses subjective criteria in rating applicants. Subjective criteria per se are not unlawful. They may be improper if discrimination results from their use. As already indicated, there has been no such showing of discrimination in the interview selection process.

(22) There is no evidence that the JAC has waived the age ceiling for men but not for women. Persons over the age ceiling were admitted pursuant to court order and where an employer signed a labor agreement with Local 46. Both exceptions applied to women as well as men.

(23) No evidence exists to support a finding tht any defendant intentionally discriminated against any plaintiff.

(E) Agency.

(24) The JAC is an agent whose joint principals are NECA and Local 46.

(25) The fact that NECA and Local 46 retain the power to control the JAC makes it their agent rather than a trust.

(26) The fact that neither NECA nor Local 46 alone control the JAC is irrelevant since they control it jointly.

(27) The JAC does not meet the requirements of a trust under Section 302 of the Labor Management Relations Act because its trust agreement does not provide that deadlocks be resolved by an impartial umpire.

(28) Because the state law under which the JAC was formed makes NECA and Local 46 representatives " . . . persons known to represent the interests of employer and employees respectively . . ." they do not have the independence required of trustees.

(29) Defendants argue that federal labor law rather than common law applies in determining whether the JAC is an agent or

a trust. However, common law principles have been applied in resolving agency questions under Title VII. Similarly, common law principles have been applied in determining whether a pension program is an agent or a trust.

(30) Even if the JAC were a true trust this would not preclude it from being the agent of NECA and Local 46 since they are the beneficiaries under the trust agreement and since it is subject to their control.

(F) Remedies.

(31) Sybil Brown, Anne Caldwell, and Sally McRae are entitled to relief which will restore them to the position where they would have been were it not for the discrimination found here. This includes back pay plus 7 percent per annum simple interest from June 1, 1977. The back pay should take account of normal advancement through the program to journey-level

status.

(32) Sally McRae should be admitted to the first opening in the construction program with appropriate credit for her experience in the residential program. She is entitled to front pay at journey-level scale until she is admitted to the program.

(33) Based solely on the 1977 discrimination against her, Sally McRae is entitled to full relief. However, the 1978 discrimination against her provides an independent basis for relief from 1978 on.

(34) To ensure that back pay restores them to their rightful place, Sybil Brown, Anne Caldwell, and Sally McRae are each entitled to be paid from September 1, 1981 until they graduate from the apprenticeship program the difference between journey-level wages and what they are now making.

(35) Defendants should be required to make fringe benefit contributions

sufficient to ensure that Sybil Brown, Anne Caldwell, and Sally McRae each have the same coverage they would have had if they had been admitted to the construction program in 1977.

(36) Because the JAC is their agent NECA and Local 46 are jointly and severally liable with it for all monetary awards.

(37) As prevailing parties under 42 U.S.C. §2000e-5(k), Sybil Brown, Anne Caldwell, and Sally McRae are entitled to an award of reasonable attorney fees, and based upon a consideration of those factors set forth in Finding of Fact (94) through (106), the fee is set at $22,946.25.

DATED this 30th day of August, 1982.

/s/ Philip K. Sweigert
Philip K. Sweigert
United States Magistrate
and Special Master

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REPORT OF SPECIAL MASTER

NOS. C77-817C and C79-131C

SYBIL BROWN, et al.,
Plaintiffs

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

FILED August 30, 1982

This case was referred to me for trial pursuant to the Court's Orders of Reference dated April 10, 1978 and August 21, 1979. The case was tried on August 17, 18, 20, 21, and 28, 1981, and plaintiffs' Motion for Attorneys' Fees was submitted on December 18, 1981. I am herewith filing with the Clerk "Recommended Findings of Fact and Conclusions of Law" which I am recommending be adopted by the Court, together with a transcript of the Oral Decision.

DATED this 30th day of August, 1982.

/s/ Philip K. Sweigert
Philip K. Sweigert
United States Magistrate
and Special Master

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ORDER

NOS. C77-817M and C79-131M

SYBIL BROWN, et al.,
Plaintiffs

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

ENTERED September 3, 1981

The Court has reviewed defendants' Motion to Dismiss Parties and Claims, the memoranda of the parties, the Report and Recommendation of United States Magistrate Philip K. Sweigert, and the balance of the relevant files.

It is therefore ORDERED:

(1) Said Report and Recommendation is hereby approved and adopted;

(2) Defendants' Motion to Dismiss Parties and Claims is hereby DENIED; and,

(3) The Clerk of the Court is to direct copies of this order to counsel for both parties and to Magistrate Sweigert.

DATED this 3rd day of September, 1981.

/s/ Walter T. McGovern
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REPORT AND RECOMMENDATION

NOS. C77-817M and C79-131M

SYBIL BROWN, et al.,
Plaintiffs

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiff,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

FILED August 30, 1982

INTRODUCTION AND SUMMARY CONCLUSION

This is a sex discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq., originally brought by five women against Puget Sound Electrical Apprenticeship and Training Trust (Training Trust) under Cause No. C77-817M. The claims of one plaintiff were dismissed by stipulation and the four remaining plaintiffs then filed a second action under Cause No. C79-131M against the Puget Sound Chapter of the Electrical Contractors Association ("NECA") and Local 46 of the International Brotherhood of Electrical Workers ("Local 46"), as well as the Training Trust. The two cases were consolidated by Stipulation and Order dated May 5, 1980 (Dkt. #77).

Defendants NECA and Local 46 jointly established defendant Training Trust which maintains an apprenticeship program to which plaintiffs sought admission. At the

time plaintiffs initially applied to the program, Training Trust required that applicants be between the ages of 18 and 25. An exception was made for veterans, however, who were allowed to deduct one year from their age for each year served in the military, up to a maximum of four years. In 1978, the age ceiling was raised to 29 for all applicants and the age preference offered to veterans was thereafter terminated.

Plaintiffs Sybil Brown and Anne Caldwell applied for admission to the apprenticeship program in 1977 and 1976 respectively, but were told that they were over age. They reapplied in 1978 and were admitted. Plaintiffs Sharon Prater and Sally McRae applied to the program in 1976 and 1977 and were refused admission because they were over age. Both reapplied but were again refused admission.

Plaintiffs allege violations of Title

VII in three respects: first, the age requirement perpetuated past discrimination; second, the veterans preference discriminated against women; and third, plaintiff Sharon Prater was denied admission for retaliatory reasons.

Defendants have filed a Motion to Dismiss Parties and Claims seeking to (1) dismiss plaintiffs' claims that the veterans preference violated Title VII; (2) dismiss Local 46 and NECA as parties to the suit; and (3) dismiss plaintiffs' claims for back and forward pay against the Training Trust. Both parties submitted memoranda to support their positions.

For the following reasons, I recommend that the Motion to Dismiss Parties and Claims to be denied.

DISCUSSION

(A) Veterans Preference.

The Training Trust had an exception to the age requirement whereby veterans were

allowed to deduct from their age one year for each year served in the military, up to a maximum of four years. Plaintiffs maintain that this policy violates Title VII because it has a disparate impact on women.

Defendants argue that the age credit granted to veterans does not violate Title VII because veterans preference schemes do not constitute gender discrimination. Defendants rely on Personnel Administrator of Mass. v. Feeney, 422 U.S. 256 (1979) to support their position. Feeney, however, only addressed the issue of whether a policy of giving preference to veterans violated the Fourteenth Amendment. The court used a two part inquiry to determine whether the gender-neutral policy violated the Fourteenth Amendment because of its allegedly adverse impact on women:

> "The first question is whether the statutory classification is indeed neutral in the sense that it is not gender

> based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender based discrimination."

422 U.S. at 274.

Applying the two part test to the facts of the case, the Court found that the classification in question was neutral because it only distinguished between veterans and non-veterans, not between men and women. Since the classification was not based upon gender, the court then addressed the second part of the inquiry, and concluded there was no evidence in the record indicating discriminatory purpose.

In a Title VII disparate impact case, the first element of the Feeney two part analysis is always present because the practice at issue is always facially neutral. See, e.g. Dothard v. Rawlinson, 433 U.S. 32 (1977) (height and weight requirements); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (aptitude

tests); Griggs v. Duke Power Company, 401 U.S. 424 (1971) (high school diploma requirements); Green v. Missouri-Pacific R.R., 523 F.2d 1290 (9th Cir. 1975) (conviction records). The second part of the analysis used in Feeney, however, is not applicable because intent or discriminatory motive is not relevant to a Title VII case:

> "Title VII is not concerned with the employers 'good intent or absense of discriminatory intent' for Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. Griggs v. Duke Power Co., 401 U.S. 424, 432."

Albemarle Paper Co. v. Moody, 422 U.S. at 422.

Thus, in the context of a challenge under the Fourteenth Amendment, a neutral policy that has a disparate impact on a protected group "is unconstitutional, under the Equal Protection Clause only if the impact can be traced to a discriminatory purpose." Personnel Administrator of Mass.

v. Feeney, 442 U.S. at 272. A neutral policy violates Title VII, however, whenever it has a disparate impact on a protected group and cannot be justified as a business necessity. Dothard v. Rawlinson, supra; Griggs v. Duke Power Company, supra. Indeed, one court has held a veterans preference program violative of Title VII because it has a disproportionate impact on women. Krenzer v. Ford, 429 F. Supp. 499 (D. D.C. 1977). Since plaintiffs have alleged that the Training Trust's veteran's preference scheme had a disparate impact on women, their claim should not be dismissed.

Defendants also rely on Bannerman v. Department of Youth Authority, 436 F. Supp. 1273 (N.D. Cal. 1977), aff'd 615 F.2nd 847 (9th Cir. 1980), to support their position. Bannerman, however, held only that plaintiffs were precluded from challenging under Title VII a veteran's preference

program instituted by a state agency because Section 712 of the Act, 42 U.S.C. §2000(e)-11, provides that Title VII shall not be construed to repeal or modify federal, state, or local laws creating special rights or preferences for veterans. 436 F. Supp. at 1279-80. Bannerman is not applicable to this case as defendants are private employers and therefore not covered by Section 712.

B) Motion to Dismiss Local 46 and NECA.

Defendants contend that Local 46 and NECA should be dismissed as defendants because the Training Trust, the defendant that established and operated the program in question, is a separate entity, and an agency relationship does not exist between Local 46, NECA, and the Training Trust. In support of their position they assert that: (1) Training Trust is controlled by an equal number of trustees appointed by the

union and management (Sundt Dep. Ex. 2, p. 1, Dkt. #16); (2) The admission qualifications for the apprenticeship program challenged by plaintiffs are set by majority vote of the Trustees (Oleson Dep. 18, Dkt. #68): (3) There is no evidence that either Local 46 or NECA have instructed the trustees how to vote on issues (Oleson Dep. 32, Dkt. #13; Sundt Dep. 11, 19, Dkt. #16; Keller Dep. 16, Dkt. #15); (4) There is no general tendency for votes to split along management and labor lines (Oleson Dep. 15, Dkt. #13); and (5) No trustee has been fired by Local 46 or NECA (Sundt Dep. 11, Dkt. #16, Keller Dep. 13, Dkt. #15).

Plaintiffs contend that an agency relationship is not required to establish Title VII liability. To support this contention, plaintiffs argue that: (1) The language of the relevant statute, 42 U.S.C. §2000(e)-2(d)(2), makes employers, unions,

and training trusts liable for discriminatory acts; (2) Courts have held employers, training trusts, and unions liable without a finding of agency; and, (3) Mere acquiescence in another's discriminatory acts constitutes a Title VII violation. In the alternative, plaintiffs argue that an agency relationship does in fact exist between NECA, Local 46, and the Training Trust.

As to the argument that the statutory language itself imposes liability, Title 42 U.S.C. §2000(e)-2(d)(2) states that:

> "It shall be an unlawful practice for any employer, labor organization, or joint labor management committee controlling apprenticeship . . . to discriminate . . . in admission to, or employment in, any program established to provide apprenticeship . . . ."

This language does not support plaintiffs' position that employers and unions are always liable for discriminatory acts of their training trusts; it simply states

that the organizations listed cannot discriminate in their apprenticeship programs. The statute does not state that if one entity discriminates, then all three will be held liable for a Title VII violation.

In support of their second contention, plaintiffs cite two cases that have held employers, unions, and training trusts liable without a specific finding of agency - Hameed v. Local 396, Ironworkers, 637 F.2d 506 (8th Cir. 1980) and U.S. v. Masonry Contractors Ass'n of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974). These cases, however, involved alleged direct participation by employers and unions in the challenged practice. In Hameed, for example, the court stated that the union, the Ironworkers Joint Apprenticeship Committee, and the National Ironworkers and Employer Training Program all controlled training opportunities. 637 F.2d at 509.

In Masonry Contractors Ass'n of Memphis, Inc., the complaint alleged that various contractors, a union, and a Joint Apprenticeship Committee all engaged in a pattern and practice of discriminiation. 479 F.2d at 847. Defendants in the present action maintain, contrary to the cases cited above, that only the Training Trust is involved in the apprenticeship program challenged by plaintiffs.

Plaintiffs cite two cases to support their third contention that mere acquiescence in another's discriminatory practice constitutes a Title VII violation -Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) and Macklin v. Spector Freight Systems, Inc., 479 F.2d 979 (D.C. Cir. 1973). These cases, however, do not address this issue or otherwise support plaintiffs' position.

Plaintiffs (sic) alternative argument is that the Training Trust is an agent of

the NECA and Local 46, with the latter two groups acting as joint principals. Plaintiffs point out that the Training Trust members are, under R.C.W. 49.04.040, not independent trustees but "employer and employee representatives" who are ". . . known to represent the interests of employer and of employees respectively." Plaintiffs add that a deadlock on the Training Trust is resolved like any other labor-management dispute, that NECA's four representatives to the Training Trust constitute one of its standing committees (Sundt Dep. pp. 16-17), that Local 46's representatives to the Traning (sic) Trust comprise a committee of the local union (Exhibit A, p. 14, attached to Memorandum in Opposition to Motion to Dismiss), and that NECA retains the power to countermand the actions of its representatives to the Training Trust (Sundt Dep. pp. 18-19).

At the very least, plaintiffs'

assertion of an agency relationship between the Training Trust, NECA, and Local 46 presents a question of fact warranting a denial of defendants' motion to dismiss NECA and Local 46.[1] Although there is no indication that either NECA or Local 46 has ever withdrawn or fired a Training Trust representative because of the way he or she votes, it appears that the power exists to do so (Sundt Dep. pp. 18-19). In addition, the structure of the Training Trust, with NECA and Local 46 each having four representatives with tie votes being settled through the grievance and arbitration procedures (Sundt Dept., Ex. 2, p. 2), resembles a joint principal structure with the Training Trust acting as

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[1]Since matters outside the pleadings have beeen presented to and considered by the Court, the motion to dismiss should be treated as one for summary judgment pursuant to F.R.C.P. 12(b)(6), and all reasonable doubts touching the existence of a material fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429 (9th Cir. 1976).

an agent in the training of future employees and union members. See, Restatement of Agency, 2d §20(f).

Defendants rely on N.L.R.B. v. United Broth. of Carpenters and Joiners, Etc., 531 F.2d 424 (9th Cir. 1976) to support their position that an agency relationship does not exist in the present action. There, the Ninth Circuit reversed the N.L.R.B.'s finding that a pension trust, similar in structure to the Training Trust in this case, was an agent of the union. The Court noted that an agent, unlike a trustee, is subject to the control of another. 531 F.2d at 526. The Court con- (sic) concluded that the pension trust was not an agent of the union because the union could not be said to control the trust since control was shared between both the union and the employer. 531 F.2d at 527.

In the present action, control over

the training trust is also shared between the employer and the union. There are an even number of Local 46 and NECA representatives (Sundt Dep., Ex. 2, p. 1), a quorum for a Training Trust meeting is three representatives from each side (Id.) and three representatives of either side can cast the fourth's vote in his or her absence Id at 1-2). Unlike Carpenter, however, plaintiffs in the present action are attempting to hold both principals liable for the Training Trust's alleged discrimination. As joint principals, they may be liable for the acts of their agent. See, Restatement of Agency, §20(f).

(c) Liability of Training Trust for Monetary Awards.

Defendants contend that 42 U.S.C. §2000(e)-5(g) exempts training programs from back pay awards. That section states:

> ". . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as

> may be appropriate which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."

Defendants (sic) argument appears to be that since training trusts were not listed with employers, employment agencies, or labor organizations, only the latter are liable for back pay awards. There is no indication in the statute, however, that the listing of employer, employment agency, or labor organization was meant to be exclusive. On the contrary, the language "or any other equitable relief as the court deems appropriate" would suggest that back pay awards are authorized by the statute.[2] The Eighth Circuit has recently held that:

---

[2]Back pay awards are not a legal remedy; they are an integral part of the equitable remedy of reinstatement. Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975).

> "The fact that defendants in this case are not employers or companies but are a union local and joint apprenticeship committee does not mitigate their liability for back pay awards . . . ."

Hameed v. Local 396, Ironworkers, supra, at 522. See also, U.S. v. Masonry Contractors Ass'n of Memphis, Inc., supra. Defendants have cited no authority to the contrary. The motion to dismiss the claims for back pay awards against the Training Trust should therefore be denied.

A proposed form of Order accompanies this Report and Recommendation.

DATED this 15th day of June, 1981

/s/ Philip K. Sweigert
Philip K. Sweigert
United States Magistrate

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 83-3865

DC CV NOS. 77-817 and 79-131 JCC

JUDGMENT

SYBIL BROWN, ANNE CALDWELL AND
SALLY MCRAE

Plaintiffs-Appellees,

vs.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendants-Appellants.

SYBIL BROWN, ANNE CALDWELL AND
SALLY MCRAE

Plaintiffs-Appellees,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
a corporation; and, LOCAL 46,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS.

Defendants-Appellants.

FILED May 3, 1984

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (Seattle)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is reversed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

O R D E R

NO. 83-3865

NOS. C77-817C and C79-131C

SYBIL BROWN, et al.,
Plaintiffs

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST,

Defendant.

SYBIL BROWN, et al.,
Plaintiffs,

v.

PUGET SOUND CHAPTER NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION,
et al.,
Defendants.

FILED July 25, 1984

Before: WRIGHT, TANG, and ALARCON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Tang and Alarcon have voted to reject the suggestion for a hearing en banc. Judge Wright has recommended rejection of the same.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing enbanc is rejected.

STATUTES

42 U.S.C. §2000e-2. Discrimination because of race, color, religion, sex, or national origin

(1) Employers. It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(C) Labor organization. It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an

employer to discriminate against an individual in violation of this section.

* * *

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in any program established to provide apprenticeship or other training.

42 U.S.C. §2000e-5. Prevention of unlawful employment practices

* * *

(b) Charges; notification; investigation and determination. Whenever a charge is filed by or on behalf of a person claiming

to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-managment committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the

Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its

officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

42 U.S.C. §2000e-11. Veterans' preference

Nothing contained in this title [42 USCS §§ 2000e et seq.] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

REGULATIONS

29 CFR § 1601.12 Contents of charge; amendment of charge.

(a) Each charge should contain the following: (1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful

employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

* * *

Office-Supreme Court, U.S.
FILED
NOV 20 1984
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-687

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

SYBIL BROWN, ANNE CALDWELL AND
SALLY MCRAE
Petitioners,

v.

PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST; LOCAL 46,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS; AND PUGET SOUND
CHAPTER NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION,
Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR RESPONDENTS

Hugh Hafer
2815 Second Avenue
Seattle, WA 98121
Attorney for Respondents

12 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) An apprenticeship committee granted veterans an age credit so that veterans, like nonveterans, had eight years in which to apply for apprenticeship. Did the committee violate Title VII by rejecting applications filed by overage female nonveterans who alleged no obstacle to timely application?

(2) Respondents contend that the case does not present an issue concerning the "clearly erroneous" rule.

(3) Did the court lack jurisdiction over one petitioner's claim (not filed with the EEOC) that she was bypassed by admission to an apprenticeship program by a lower-rated male, because that claim was not reasonably related to her earlier EEOC charge that the program wrongly found her overage but permitted veterans of the same age to apply?

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COUNTERSTATEMENT OF THE CASE

Petitioners applied for admission to respondent Joint Apprenticeship and Training Committee's (JATC) commercial electrician program in 1977. The JATC rejected their applications as each applicant was over the program's maximum age level of age 26 (Appendix, A56-59). At that time, the JATC allowed veterans of either sex to subtract one year from their age for each year of military service, up to a maximum of four years (A52-53). The Special Master found as a fact that "[i]n establishing and maintaining its veterans age credit policy, the JATC relied in good faith on policies endorsed by the federal government" (A53). On three occasions from 1966 to 1971, the federal Bureau of Apprenticeship Training had authorized exemption from maximum age limitations for veterans by apprenticeship programs.

All three petitioners filed charges with the Equal Employment Opportunity Commission (EEOC). Petitioner McRae alleged in her charge (A12-13):

> The respondent discriminates against women in the administration of, and in admission to, the apprenticeship program. I am a woman. On August 16, 1977, I tried to apply for the commercial electrical apprenticeship program. My application was rejected because I was over 25 years old and had no military service. I believe this age requirement is discriminatory.

The JATC dropped its veterans age credit in 1978 and allowed applicants to apply up through age 29. Petitioners Brown and Caldwell re-applied in 1978 to the JATC's commercial electrician program and were admitted. Petitioner McRae applied to and was accepted into the JATC's residential electrician program. She also re-applied in 1978 to the construction program. She was placed on the waiting list. Later, a male below her on the waiting list was admitted to the program. McRae did not file an EEOC charge concerning this event.

After trial, a Special Master found the JATC liable under Title VII for Petitioners' rejections. Liability was based on the Special Master's view that the veterans age credit had a disparate impact on women. Intent was deemed irrelevant (A78-80). The Special Master denied the JATC's jurisdictional objection to McRae's 1978 claim of discriminatory bypass and found the JATC liable for that as well. The Special Master's report was approved by the district court and judgment was entered.

The court of appeals reversed in all respects. It concluded that the disparate impact analysis was inapplicable to the facts presented (A19, 22). Petitioners were not harmed by the veterans age credit as they, like veterans, had eight effective years to apply to the program (A17-18, 22). The court of appeals also found that it had no jurisdiction to resolve McRae's separate 1978 claim. That claim, on which no EEOC charge was filed, was not reasonably related to her 1977 EEOC charge challenging the veterans age credit (A11-14).

SUMMARY OF ARGUMENT

Petitioners were not harmed by the JATC's veterans age credit. Their applications were rejected simply because they waited more than the given eight years to apply. Veterans too had eight years to apply — eight civilian years during which they had the opportunity to apply. Petitioners neither alleged nor proved any obstacle to their applying on a timely basis. Petitioners therefore have no standing to raise the concerns of women who raised children during the relevant time period or of other groups whose circumstances arguably limited their opportunity to apply. Hence, no substantial federal question is presented on the facts of this case.

Careful reading of the circuit court's opinion reveals that the appellate court found as a matter of law that the disparate impact test was inapplicable. The court did not overturn any

findings of fact regarding impact. It is academic to this case whether the circuits conflict concerning the scope of review for finding of disparate impact.

Rejection of McRae's 1978 claim was not based on her mistaken selection of a theory of liability. Her applications were denied in two separate years for two separate reasons. No decision of this Court excuses a plaintiff's statutory obligation to file a charge with the EEOC before suit when suit is based on a claim which bears no reasonable relation to a matter which was presented to the EEOC.

ARGUMENT

I. No imporant federal question is presented, as petitioners, who failed to apply for admission during an eight year period, were not harmed by an age credit for veterans which equalized veterans' opportunity to apply.

Contrary to petitioners' argument, this is not a veterans preference case. Petitioners had eight years to apply for admission to the apprenticeship program, from their eighteenth to their twenty-sixth birthdays. They neither alleged nor proved any barrier, sex-linked or otherwise, to applying before age 26. Each merely failed to timely apply. By operation of the JATC's veterans age credit, veterans had up to eight years during which they were in the civilian labor market to apply. While it is true that a twenty-seven year old veteran could apply, it is not true that that veteran had more of an opportunity than petitioners to apply. By definition, a person cannot serve an apprenticeship while he or she is in the military. Using this analysis (A17-18), the court of appeals found that "the existence of the age credit had no adverse effect whatsoever on women" or on Petitioners (A18, 22).

The veterans age credit at issue here is a far cry from the veterans preference which petitioners argue should be reviewed by this Court. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) involved an absolute preference for veterans for state jobs. Had the JATC given bonus points to veteran applicants, the issue posed by petitioners would be joined. On the facts of this case, the Court cannot reach the relationship between veteran preferences and Title VII on which the Petition is premised.

Petitioners further have no standing to argue that the veterans age credit is unfair because it singles out only one of life's vicissitudes. Petitioner did not plead that they were barred from applying earlier due to pregnancy or childbearing responsibilities. Other factors suggested by petitioners, such as civilian employment in hospitals, enrollment in college, or residence in other locales, are not sex-based. As petitioners do not belong to the groups for whom they advance their argument, they lack standing. *Compare Coopersmith v. Roudebush*, 517 F.2d 818, 823 (D.C. Cir. 1975) (plaintiff had completed childrearing and resumed full-time employment; no standing to challenge employment preference for recent legal experience).

II. This petition does not squarely present a conflict between the circuits concerning the "clearly erroneous" rule, as the court of appeals found the disparate impact test inapplicable and did not overturn any fact findings concerning impact.

Quoting one sentence from the appellate opinion, petitioners represent that the court of appeals "overturned the district court's finding of disparate impact without giving it the deference required by the 'clearly erroneous' rule" (Petition, 6). Petitioners fail to advise the Court that the court of appeals found the disparate impact test inapplicable. At A19, the court of appeals states:

> Contrary to Appellee's contention, the disparate impact analysis developed in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is inapplicable here.

And at A22, the court concluded:

> We therefore hold that the district court erroneously applied a disparate impact analysis to these facts.

At no point did the court of appeals overturn a fact finding concerning impact. The court instead found the analysis itself legally improper.

This Court has recognized that not every set of facts is susceptible to analysis under the disparate impact test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805-806 (1973) rejected the notion that an employer's policy of denying re-employment to those who engaged in unlawful conduct against it came under the impact rationale. Lower courts as well have rejected impact analysis for certain cases. *See, e.g., Yuhas v. Libbey-Owens-Ford Co.*, 562 F.2d 496, 500 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (anti-nepotism rule). The court of appeals here found the impact test inapplicable due to its view that petitioners were not harmed by the veterans age credit. Hence, this case does not present the conflict concerning the "clearly erroneous" rule suggested by Petitioners.

III. McRae's 1978 claim was rejected not because she chose the wrong legal theory for her EEOC charge but because the rejection of her second application, over which she filed no charge, was unrelated to her challenge to the veterans age credit.

Petitioner McRae filed an EEOC charge which, in its factual allegations, addressed her claim that she was wrongly rejected

due to age because of the veterans age credit. Over one year later, her second application to the JATC was not acted upon even though a lower rated male was admitted off the waiting list. Since the JATC had lifted its age limit by that time, McRae was within the permissible age limit. The JATC's second action, in 1978, had nothing to do with age and nothing to do with its eliminated veterans age credit. McRae sued on the 1978 denial even though she filed no EEOC charge concerning it.

The court of appeals sustained the JATC's jurisdictional objection to consideration of McRae's 1978 claim. In so doing, it applied a rule that (A11):

> When an employee seeks judicial relief for incidents not listed in his original EEOC charge, a federal court may assume jurisdiction over the new claims if they are "like or reasonably related to the allegations of the EEOC charge." [citation omitted]

The rule is an exception to the statutory requirement that a person file a charge with the EEOC and receive a right-to-sue letter before filing suit. 42 U.S.C. § 2000e-5(f)(1). The court of appeals also stated that a charging party could not "bypass the administrative process" where the second claim is "*not* so closely related that the agency action would be redundant" (A-12) (emphasis in original).

The court of appeals held that McRae's 1978 claim of discriminatory bypass was not related to her 1977 claim and EEOC charge contesting her rejection due to age (A13):

> Any investigation of whether McRae's application was rejected as the result of disparate *impact* would not have encompassed her subsequent claim that when she reapplied to the program she was subjected to *intentional* sex discrimination. [emphasis in original]

Petitioner McRae argues that her 1978 claim was rejected because she failed to elect the proper legal theory at the charge filing stage (Petition, 8). She misreads the opinion. The court of appeals focused on what the EEOC would have discovered and attempted to conciliate when processing her EEOC charge. It found that the agency would not have reviewed her 1978 claim in the context of investigating the veterans age credit issue. It is true that the court spoke in terms of "impact" and "intention." But these references, in the context of the rationale for its decision, were shorthand. McRae's 1978 claim was rejected because it was too unrelated to her 1977 charge to assume that the EEOC could have performed the investigatory and conciliatory role assigned to it by Congress.

There is nothing hypertechnical about insisting that a claimant file an EEOC charge on a new matter even though she filed earlier against the same respondent on another matter. "Procedural niceties" have been criticized where the procedural error had no effect on how the charge was processed. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Here, Petitioner McRae avoided the agency altogether.

CONCLUSION

For the foregoing reasons, the Court should deny the writ of certiorari.

DATED this 21st day of November, 1984.

Hugh Hafer
Attorney for Respondents

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NO. 84-687

Supreme Court, U.S.
FILED
DEC 3 1984
ALEXANDER L. STEVAS
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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1984

SYBIL BROWN, ANNE CALDWELL AND
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PUGET SOUND ELECTRICAL APPRENTICESHIP
AND TRAINING TRUST; LOCAL 46,
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS; AND PUGET SOUND
CHAPTER NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION,
Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SUPPLEMENTAL BRIEF OF PETITIONERS

Abraham A. Arditi
Northwest Labor and Employment Law Office
900 Hoge Building
Seattle, Washington 98104
1-206-623-1590
Attorney for Petitioners

IN THE SUPREME COURT
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PUGET SOUND ELECTRICAL APPRENTICESHIP
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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

ARGUMENT

This Court recently granted certiorari on an issue similar to one raised here—namely, the limits imposed by the "clearly erroneous" rule on review of factual findings in Title VII sex discrimination cases. *Anderson v. City of Bessemer,* No. 83-1623 (S. Ct. June 18, 1984). Because the outcome of that case may affect this case, the Court should grant certiorari here.

Respectfully submitted,
Abraham A. Arditi
Attorney for Petitioners